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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 278

AARON D. FRANK,

Appellant,

vs.

STATE OF MARYLAND,

Appellee.

ON APPEAL FROM THE CRIMINAL COURT OF BALTIMORE (MARYLAND)

MOTION TO AFFIRM

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the judgment and sentence of the Criminal Court of Baltimore be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

OPINION BELOW

Although no opinion was delivered by the Court below, the questions involved have previously been decided by the Maryland Court of Appeals in *Givner v. State*, 210 Md. 484, 124 A. 2d 764.

STATEMENT OF CASE

This is an appeal from the Criminal Court of Baltimore (Maryland) after certiorari had been denied by the Court of Appeals of Maryland. The Appellant was convicted of refusing to allow a health inspector to enter his house in the daytime for the purpose of inspecting his house for a suspected health nuisance and sentenced under Section 120 of Article 12 of the Baltimore City Code (1950 Edition) to pay a fine of Twenty Dollars ($20.00).

ARGUMENT

The judgment and sentence of the Criminal Court of Baltimore is correct in this case in light of the decision of the Maryland Court of Appeals in *Givner v. State*, 210 Md. 484, 124 A. 2d 764. The Appellant was convicted of violating Article 12, Section 120 (Baltimore City Code, 1950 Edition) which reads as follows:

> "Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars."

The Appellant contends that inspections ordered by the above ordinance constitute a violation of his constitutional rights both State and Federal. The General Assembly of Maryland has granted the Mayor and City Council of Baltimore powers as set forth in Section 6 of the Charter of Baltimore City stating that they:

> "* * * shall have full power and authority to exercise all of the powers heretofore or hereafter granted to it by the Constitution of Maryland or by any Public General or Public Local Laws of the State of Maryland; and in particular; without limitation upon the fore-

going, shall have power by ordinance, or such other method as may be provided for in its Charter * * *:

* * * * * *

"(5) Entry on Private Property

"To enter, by its officers or agents, the land or possessions of any person for the purpose of carrying out the powers enumerated in this Section 6.

* * * * * *

"(11) Health and Nuisances

"To provide for the preservation of the health of all persons within the city; to prevent the introduction of contagious diseases within the city * * *; and to prevent and remove nuisances.

* * * * * *

"(24) Police Power

"To have and exercise within the limits of Baltimore City all the power commonly known as the Police Power to the same extent as the State has or could exercise said power within said limit; * * *"

The Mayor and City Council of Baltimore, having the power, thus enacted the ordinance involved in the present case. However, no question has been raised as to the power of the municipality to adopt the ordinance here involved, other than the claim that it authorizes unlawful searches.

The issue in this case is whether or not the inspector under the Health Article of the Baltimore City Code was or was not lawfully entitled to enter and inspect the Appellant's residence. The answer, of course, depends upon whether the proposed inspections would infringe any constitutional right of the Appellant under either the Federal or State Constitutions — specifically, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, or Article 26 of the Declaration of Rights of the Maryland Constitution.

Article 26 of the Maryland Declaration of Rights states:

> "That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted."

The Court of Appeals of Maryland has said that this Article is in *pari materia* with the Fourth Amendment to the Constitution of the United States. *Blum v. State,* 94 Md. 375, 51 A. 26; *Bass v. State,* 182 Md. 496, 35 A. 2d 155; *Johnson v. State,* 193 Md. 136, 66 A. 2d 504.

In *Johnson v. State, supra,* Article 26 was construed as a limitation upon the power of the Legislature to pass any law which would violate that Article. This construction, in practical effect, is in accord with the rule stated by this Court in *Wolf v. Colorado,* 338 U. S. 26, that a State may not affirmatively authorize an unlawful search and seizure without violating the Due Process Clause of the Fourteenth Amendment. The question then is whether the intended searches were unlawful. In *Wolf v. Colorado, supra,* this Court adhered to the doctrine that the Fourteenth Amendment was not "shorthand for the first eight amendments of the Constitution", and does not therefore incorporate them. The opinion of the Court said:

> "This (the Due Process) Clause exacts from the States for the lowliest and most outcast all that is 'implicit in the concept of ordered liberty'."

The opinion went on:

> "The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the

Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of the English-speaking peoples.

"Accordingly, we have no hesitation in saying that were a State to affirmatively sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

It is, however, clear that prohibitions against unreasonable searches and seizures do not prohibit reasonable searches and seizures. *U. S. v. Rabinowitz,* 339 U. S. 56. Cornelius on *Searches and Seizures,* 2nd Ed., Section 35, states:

"The constitutional provision in question, while primarily designed to protect the individual in the sanctity of his home and in the privacy of his books, papers and property, does not apply to reasonable rules and regulations adopted in the exercise of the police power for the protection of the public health, morals and welfare."

Then he cites some examples of reasonable inspection laws relating to pawnbrokers and food dealers. The inspections of inns or hotels and institutions is upheld. *Hubbell v. Higgins,* 148 Ia. 36, 126 N. W. 914; *Sister Felicitas v. Hartridge,* 148 Ga. 832, 98 S. E. 538.

In *Simms v. Liuzza,* 168 La. 714, 123 So. 301, the Louisiana Court said:

"Plaintiff contests the right of the state fire marshall to order ex parte the demolition of Liuzza's building. In *Zibilich v. Rouseo,* 166 L. 547, 117 So. 586, we said that:

" 'Section 5 of Act No. 26 of 1914 empowers the fire marshall or his authorized representative, upon complaint of any person having an interest in any building or property adjacent, and without any such complaint, to enter into and upon all buildings at all reasonable hours for the purpose of examination, and whenever any building or other structure which, for want of proper repair, or by reason of age and delapidated condition, or for any cause, is especially liable to fire, the said fire marshall or his representative shall order the same to be removed or remedied, and such order shall be forthwith complied with by the owner or occupant of the said building.'

"The fire marshall, therefore was vested with the power under the law to inspect the building in question for the purpose of determining its condition with respect of its liability to fire, and, if he found such to be the fact, to order the owner to demolish the structure."

The Appellant cites and relies upon the case of *District of Columbia v. Little*, 62 A. 2d 874 (Ct. of Mun. App. D.C.) aff. 178 F. 2d 13, 13 A. L. R. 2d 954, 85 U. S. App. D.C. 244, aff. 339 U. S. 1. The Municipal Court of Appeals reversed on constitutional grounds the conviction of Little on a charge that she had interfered with a health officer of the District of Columbia in his duty of inspecting her house.

The facts were that a health officer, in response to a complaint, went to Little's house to investigate. The health officer, who did not have a search warrant, requested Mrs. Little to allow him in her house to inspect the premises. She protested his right to enter her house and refused to unlock the door for him. She neither used nor threatened force of any kind. The Court of Appeals for the District of Columbia affirmed the judgment of the Court of Municipal Appeals by a 2-1 decision, in which both the majority and the minority proceeded entirely on constitutional grounds.

On *certiorari*, a majority of the Supreme Court, in an opinion by Mr. Justice Black, affirmed the judgment of the Court of Appeals on the ground that her "mere refusal to unlock the door accompanied by remonstrances on substantial constitutional grounds was" not "the kind of interference prohibited by the (District of Columbia health) regulations" upon which the prosecution was based. The majority found it unnecessary to consider the constitutional question of whether or not the Fourth Amendment prohibited the health officer from inspecting the premises without a search warrant. Mr. Justice Burton, with whom Mr. Justice Reed agreed, dissented on the factual question and disagreed with the Court of Appeals on the constitutional question. Mr. Justice Burton said in the dissenting opinion:

> "* * * In my opinion, also, the duties which the inspector was seeking to perform, under the authority of the District, were of such a reasonable, general, routine, accepted and important character, in the protection of the public health and safety, that they were being performed lawfully without such a search warrant as is required by the Fourth Amendment to protect the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.
>
> "Accordingly, the conviction of the respondent should be sustained, and the judgment of the United States Court of Appeals affirming the judgment of the Municipal Court of Appeals setting aside that conviction should be reversed."

The majority opinion in the Court of Appeals of the District of Columbia holds that the Fourth Amendment prohibits the search of a home by a health officer of the District without a search warrant. The minority opinion in that Court takes the view that the requirements for

search warrants are applicable only in criminal cases, and that the object of a health department inspection is essentially a civil matter, to which any criminal prosecution is only incidental.

The majority opinion of this Court (at 339 U. S. 2-6) states in part:

> "In this Court the constitutional arguments have extended far beyond the comparatively narrow issues involved in the particular case. At one extreme the District argues that the Fourth Amendment has no application whatever to inspections and investigations made by health officers; that to preserve the public health, officers may without judicial warrants enter premises, public buildings and private residences at any reasonable hour, with or without the owner's consent. At the opposite extreme, it is argued that no sanitary inspection can ever be made by health officers without a search warrant, except with a property owner's consent. Between these two extremes are suggestions that the Fourth Amendment requires search warrants to inspect premises where the object of inspections is to obtain evidence for criminal punishment or where there are conditions imminently dangerous to life and health, but that municipalities and other governing agencies may lawfully provide for general routine inspections at reasonable hours without search warrants. An impressive array of facts is also presented concerning the uniform practices of agencies of local governments to provide for such general routine inspections in connection with sanitation, plumbing, building, etc.
>
> "Neither the facts of this case, nor the District law on which the prosecution rests, provide a basis for a sweeping determination of the Fourth Amendment's application to all these varied types of investigations, inspections and searches. Yet a decision of the constitutional requirement for a search in this particular case might have far reaching and unexpected implications as to closely related questions not now before us. This is therefore an appropriate case in which to apply our

sound general policy against deciding constitutional questions if the record permits final disposition of a cause on non-constitutional grounds. * * *"

It is true that there are many cases to the effect that a search of a home without a search warrant, otherwise than as an incident to a lawful arrest, is unlawful. See *Agnello v. United States*, 269 U. S. 20; *Harris v. United States*, 331 U. S. 145. These cases, however, dealt with criminal prosecutions only and therefore would not be conclusive in this case.

It is the Appellee's position that the exercise of police power in this case was such as was reasonable and necessary to protect the public health, safety and welfare.

The inspection by the health inspectors is in the exercise of the "police power". This was recognized in the majority opinion of the United States Court of Appeals for the District of Columbia in the *Little* case, 85 U. S. App. D. C. 242, 178 F. 2d 13, 13 A. L. R. 2d 954.

There is in the present case an instance of collision between a constitutional provision, the Fourteenth Amendment, and an exercise of the "police power" when used in the sense of that inherent power of the State exercised to preserve the public health.

The Fourteenth Amendment can no more be considered a privilege to conceal upon private premises filth which directly endangers the health of the community, than can the First Amendment be considered a privilege to arise in a crowded theatre and cry "Fire". *Schenck v. United States*, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470.

In *Nebbia v. New York*, 291 U. S. 502, 524, this Court, in upholding the conviction of a storekeeper for selling milk at a price below that allowed by an order promulgated by

a State board, pursuant to a statutory authority, held respecting the exercise of the police power:

> "* * * Touching the matters committed to it by the Constitution, the United States possesses the power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government, as shown by the quotations above given. These correlative rights, that of the citizens to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always on collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.
>
> "The Fifth Amendment in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

In numerous other cases, the Supreme Court has held that the particular constitutional provision invoked either did not apply, or that the police power exercised was a

proper limitation upon the right granted by the constitutional provision. *Mugler v. Kansas,* 123 U. S. 623, 8 S. Ct. 306, 31 L. Ed. 205; *Lawton v. Steele,* 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385; *District of Columbia v. Brooke,* 214 U. S. 138, 29 S. Ct. 560, 53 L. Ed. 941; *Calhoun v. Massie,* 253 U. S. 170, 40 S. Ct. 474, 64 L. Ed. 834; *Queenside Hills Realty Co. v. Saxl,* 328 U. S. 80, 66 S. Ct. 850, 90 L. Ed. 1096.

No one doubts the validity of protecting the right of privacy. It is not a right, however, which is inviolate in modern living. There are assaults upon our privacy every day of our lives; the gas man who enters to read the meter, the water assessor who counts the faucets and checks leakages. These are all assaults upon our privacy which we accept as part of the price of living in a complex society. To say that we will accept these invasions, but can bar the entry of inspectors who enter for the purpose of protecting the public health, is to fail to balance the conflicting rights in accordance with their relative weight. The entrance of the health inspector in the case at bar was for the protection of the homeowner as well as the rest of the community.

No exercise of a private right can be imagined which will not in some respect, however slight, affect the public. The Fourteenth Amendment, as respects State action, does not prohibit governmental regulation for public welfare; it merely conditions the exercise of the power by requiring that governmental regulation be consistent with due process. The guarantee of due process demands, in general terms, that the legislation be reasonable in the light of existing facts. In determining this reasonableness the court must evaluate the relative weights of the beneficial consequences which will follow, and the price which must be paid for them in the form of the resulting deprivation of liberty or freedom.

The duties of the Health Department to protect public health hardly require any reference but it may be worth mentioning the preamble to Ordinance No. 1543, which was passed by the Baltimore City Council (1950-1951) establishing the Housing Bureau of the Health Department. This preamble reads as follows:

"Whereas, a major objective of the Mayor and City Council of Baltimore is to combat successfully slum and blighted areas and prevent their future growth and

"Whereas, experience in the City of Baltimore has demonstrated that slum and blighted areas result in large measure from improper maintenance of dwellings, inadequate sanitation, over-crowding of dwellings and general community neglect in these areas and

"Whereas, experience has also shown that through well-planned and vigorous enforcement of minimum housing standards for safety, sanitation, population density and public health, these conditions can be relieved and prevented and

"Whereas, there has been developed in the City of Baltimore a municipal effort, known as 'The Baltimore Plan', for combating residential blight by vigorous housing law enforcement, which program requires for its maximum effectiveness:

(a) Aggressive enforcement of housing ordinances and regulations through the efforts of several of the departments of the City and the utilization of their several enforcement procedures.

(b) Compelling compliance with said ordinances and regulations both in response to complaints and also at the initiative of the City on an area basis.

(c) Centralization in a single office of responsibility for assisting the several city departments involved in housing law enforcement in establishing policies, procedures and techniques which will assure uniform and consistent enforcement, and also for assisting these departments in planning

their separate programs to avoid duplications, overlaps and conflicts, and to integrate the housing law enforcement effort with the programs of the Housing Authority of Baltimore City and the Baltimore Redevelopment Commission into an effective campaign against slum and blighted areas and

"Whereas, the Board of Estimates, prior to the adoption of this ordinance, has recommended the creation of an additional bureau in the Department of Health, to be known as the Housing Bureau, in order to meet the requirements of 'The Baltimore Plan' program hereinbefore recited * * *."

The attempted inspection of Mr. Frank's property was in response to a complaint which had been registered as to the presence of rats in the neighborhood. The inspector viewed the yard and exterior of Frank's house and he testified he saw trash, rodent feces and undue debris. This, we believe, would be sufficient to satisfy the requirements of Section 120 of Article 12 of the Baltimore City Code as to cause one to suspect the existence of a nuisance in the Frank house. The Health Inspector, after viewing this property, had cause to suspect that a nuisance existed and it was then necessary to inspect the premises so that steps could be taken to avert such a nuisance.

The Court of Appeals of Maryland, in *Givner v. State*, 210 Md. 484, said:

"We also note that all of the inspections authorized by the ordinances here involved are to be made at reasonable hours. There is no suggestion that any of the inspections was to be used as a cover to conduct a search for any violations of the criminal law or for any purpose other than the preservation of health and safety. There is no suggestion of harassment by repeated inspections.

"Where there is reason to believe that a crime is being committed, but the circumstances are not such

as to warrant an immediate arrest, and there is ample time to get a search warrant, the proper practice is to apply for such a warrant to be issued under Code (1951), Article 27, Section 328, *Johnson v. State*, 193 Md. 136, 66 A. 2d 504. This would also be sound practice if there were any occasion for a more extended search than that which might be authorized as an incident to a lawful arrest without warrant. The statute just referred to is framed with a view to the detection of crime; and, as was suggested in *Givner v. Cohen, supra*, and in *Gattus v. State*, 204 Md. 589, 105 A. 2d 661, there is serious doubt as to whether a search warrant is obtainable except under a statute or to search for stolen goods or the like. This, of itself, would not prove that a search warrant is unnecessary, but it does tend to support the rather restricted common law concept of the office of a search warrant which, we think, was in mind at the time of the adoption of both our State and Federal constitutional provisions with regard to searches and seizures and search warrants. See *Gattus v. State*, just cited."

As was stated previously, the problem here is one of personal privacy as against the protection of the public health. True, the privacy of the home of an individual is invaded whatever may be the reason for the search, but in the one case the liberty of the individual is at stake, and in the other, the health of the public. The latter is the objective of the inspection in the present case. In the usual course of procedure, if violations of the health code are found, the property owner is informed of the violations and is ordered to correct them within a stated period. If he fails to comply with such order, a prosecution is instituted for failure to do so.

This Court said in *United States v. Rabinowitz*, 339 U. S. 56 at page 63:

"What is a reasonable search is not to be determined by any fixed formula. The Constitution does not de-

fine what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case."

The difficulty of establishing an absolute criteria to determine the reasonableness of a search is shown in that case. However, here, from the circumstances of the case, we submit that the proposed inspection was reasonable.

As was said in the case of *Givner v. State*, 210 Md. 484 by the Court of Appeals of Maryland:

"We believe that on its facts, on the basis of the ordinances involved and in the light of the established practices as to the enforcement of such ordinances in Baltimore, this case falls in the zone between the extreme of constitutional arguments which are stated in the *Little Case*. We have a legislative finding of facts embodied in the preamble to Ordinance No. 1543 that interdepartmental inspection and enforcement of minimum housing standards for safety, sanitation and public health are needed to combat urban blight and the growth of slum conditions, we have the results of actual inspections in the same general area made shortly before the attempted inspection of the appellant's home and we have the fact that these inspections are of a routine nature, are to be made at reasonable hours and are primarily for protective, not punitive purposes. In these circumstances, we consider the proposed inspections reasonable, and in our opinion the case falls within one of the intermediate constitutional contentions stated in the *Little Case* under which 'municipalities and other governing agencies may lawfully provide for general routine inspections at reasonable hours without search warrants'. We hold that such inspections are not unreasonable and hence are not unlawful."

CONCLUSION

It is respectfully submitted that the judgment and sentence of the Criminal Court of Baltimore should be affirmed on the ground that the inspector was trying to perform a duty which was of such a reasonable, general, routine and important character in the protection of public health that such an inspection, without a search warrant, would not violate the Fourteenth Amendment.

Respectfully submitted,

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